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SUPREME COURT OF THE UNITED STATES.

..... **Term, 1940.**

No. .....

MONTE E. HART, ~~JAMES MONROE SMITH,~~ J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LeSAGE,

versus

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Monte E. Hart, J. Emory Adams, Seymour Weiss and Louis C. LeSage, citizens of the United States, domiciled in the State of Louisiana, respectfully bring this their application for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this criminal case.

OPINION BELOW.

The petitioners were convicted in the District Court of the United States for the Eastern District of Louisiana of violating the Mail Fraud Statute (Section 215, Criminal Code; 18 U. S. C. A., 338). They were each sentenced on September 15, 1939, as follows: Seymour Weiss and Monte Hart each to be imprisoned for 30 months and to pay fines of $1,000.00 on each of the two counts in the indictment, the prison sentences to run concurrently; and Louis C. LeSage and J. Emory Adams each to be imprisoned one year and one day and to pay fines of $500.00 on each of the two counts in the indictment, the prison sentences to run concurrently. Petitioners thereupon took their appeals to the United States Circuit Court for the Fifth Circuit, where judgment was rendered affirming their conviction on May 24, 1940 (see opinion, Tr. Vol. IV, page 1780; 112 Fed. (2d) 128). Petitioners, within the delays allowed by law, filed petitions for a rehearing in the said United States Circuit Court of Appeals for the Fifth Circuit (see Tr. Vol. IV, pages 1790 to 1828), which petitions for rehearing were denied on July 16, 1940 (Tr. Vol. IV, page 1829). That on July 19, 1940, a stay of mandate was ordered by the United States Circuit Court of Appeals for the Fifth Circuit for a period of 30 days from July 16, 1940, to enable these petitioners to apply to this Honorable Court for a writ of certiorari to review said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit (Tr. Vol. IV, page 1831).

STATUTE INVOLVED.

The statute under which defendants were convicted (sec. 215, Criminal Code; Title 18, U. S. C. A. 338) reads in its pertinent provisions, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet or advertisement, shall be fined not more than $1,000, or imprisonment not more than five years, or both." (R. S. Sec. 5480; Mar. 2, 1889, c. 393, Sec. 1, 25 Stat. 873; Mar. 4, 1909, c. 321, Sec. 215, 35 Stat. 1130.)

JURISDICTION.

Jurisdiction of this Honorable Court is invoked under paragraph (a) of Section 240 of the Judicial Code as amended (section 347, Title 28, U. S. C. A.), making it

competent for this Court to review by certiorari any case, civil or criminal, in a circuit court of appeals; and the application is made within 30 days after entry of judgment (denial of rehearing), as required by Rule XI of this Honorable Court, promulgated May 7, 1934, and in the manner required by Rule 38 of this Honorable Court.

SUMMARY STATEMENT OF MATTER INVOLVED.

The indictment charged the defendants with devising a scheme to defraud and for obtaining the sum of $75,000.00. Louisiana State University, located at the City of Baton Rouge, Louisiana, (approximately 85 miles from New Orleans) issued its check for $75,000.00, drawn on the university's account in the City National Bank, at Baton Rouge, dated October 20, 1936. The defendant Hart received the check in person at Baton Rouge, and carried it to New Orleans. There was no use of the mails whatever in the obtaining of the check, or in any detail of the transaction leading up to same claimed by the government to have been a fraudulent scheme. In the city of New Orleans, on October 28, 1936, the defendant Hart cashed the said check unconditionally over the counter of the City Branch of the Whitney National Bank, and received $75,000.00 in currency therefor. Thereafter the Whitney National Bank of New Orleans endorsed and delivered the check by messenger to the New Orleans Branch of the Federal Reserve Bank of Atlanta; the New Orleans Branch of the Federal Reserve Bank of Atlanta included it as an item in a cash letter which it mailed to the City National Bank of Baton Rouge, on which it was

drawn; the following day the City National Bank of Baton Rouge mailed to the New Orleans Branch of the Federal Reserve Bank of Atlanta an acknowledgment of receipt of the cash letter (aggregating $144,004.82, and including the item of the aforesaid $75,000.00 check of Louisiana State University). On these two mailings: (1) the cash letter from the New Orleans Branch of the Federal Reserve Bank of Atlanta to the City National Bank of Baton Rouge, and (2) the acknowledgment of same from the City National Bank of Baton Rouge to the New Orleans Branch of the Federal Reserve Bank of Atlanta, the two counts of the indictment were predicated.

QUESTIONS PRESENTED.

On these two mailings by, respectively, the New Orleans Branch of the Federal Reserve Bank of Atlanta and the City National Bank of Baton Rouge, the District Attorney founded an indictment charging that the defendants had devised a scheme to defraud and in execution of said scheme had used the mails. Realizing that it was necessary under the law that the defendants, if they caused the use of the mails, must necessarily act by the hand of an agent, even though an innocent agent, the District Attorney charged in the indictment (Tr., Vol. I, page 8):

> "That on the 28th day of October, 1936, the City Branch of the Whitney National Bank *as agent for the defendants* herein transmitted said check to the main office of the Whitney National Bank in New Orleans, which, *as agent for the defendants herein,* in accordance with its usual custom cleared the said

> check through the Federal Reserve Bank at New Orleans, Louisiana, which in turn as agent of the said City Branch of the Whitney National Bank *and of the defendants herein,* and in order to effect payment of said check forwarded the said check on the 28th day of October, 1936, to the City National Bank in Baton Rouge, Louisiana, by depositing same in an authorized depository for mail matter to be sent or delivered by the post office establishment of the United States (italics ours)."

However, it became apparent by the time the trial took place that since the $75,000.00 check had been cashed in New Orleans, and thereby had been sold to and became, as a negotiable instrument, the absolute property of the Whitney National Bank of New Orleans, the Federal Reserve Branch and the City National Bank of Baton Rouge could not have acted as agents (as thus charged in the indictment) of the defendants in the two mailings complained of. Hence the Judge told the jury in his charge (Tr., Vol. II, bottom of page 1010):

> "Having in mind what I have just said to you with reference to the $75,000.00 check you may desire to be informed as to the legal situation with reference to the charge that the New Orleans bank acted as the defendants' agent for the collection of this check. The evidence bearing on this question shows that the check was cashed by Hart and that same was indorsed by him and F. E. Ames unrestrictedly. If you find this to be a fact and I assume you will, because the contrary is not asserted, you are instructed that the City Bank Branch of the Whitney Bank of New Orleans thereby became the owner of said check and consequently said bank could not in the strict legal sense have acted as defendants' agent in the collect-

> ing of their own check. You are therefore instructed to treat this charge of agency as surplusage."

But inasmuch as every judicial acceptance of the doctrine of "causation" has heretofore been founded on the legal principle of "agency", the Judge was sore pressed to reconcile his treatment of the indictment charge of agency as surplusage with what he had to say to the jury on "causation". What he did, as we hereafter show in our supporting brief, was to change the commonly accepted language of the rule as laid down in a leading case, so as to say to the jury in the case at bar that "agency" was not necessary to "causation". This is the language of the Judge in his charge to the jury on this point which is complained of (Tr., Vol. II, top of page 1010):

> "With reference to this question of causation you are instructed that it is *not essential* to the commission of the offense that the check, letter or writing be deposited in the mail by the defendant himself *or by an agent* or another acting under his express direction, because he is equally responsible if it be deposited therein as a natural and probable consequence of an act intentionally done by him with knowledge at the time that such will be its natural and probable effect. (Italics ours.)"

To summarize the question presented, it was our contention throughout the case that there was no use of the mails by the defendants in the $75,000.00 transaction, and the two bank mailings referred to were improperly resorted to by the government to stretch the mail fraud statute over the subject-matter and obtain federal court jurisdiction; that after the trial judge contradicted the

terms of the indictment itself by telling the jurors that the federal reserve branch and the Baton Rouge bank could not have been the agents of the defendants in the mailings, he left the jury no other possible agents in the case through whom the defendants could have been found to have acted, so, in order to prevent an acquittal on this issue, he gave the jurors the improper and erroneous instruction that "causation" could take place in the absence of an agent. Such erroneous instruction destroyed the right of the defendants to have the jurors clearly told that when the Whitney National Bank purchased the check it became the absolute owner of same and whatever was done thereafter was for the account of and in the interest of the Whitney National Bank, and that without the existence of an agency on behalf of the defendants (even an innocent one) they could not legally "cause" the use of the mails.

The United States Circuit Court of Appeals for the Fifth Circuit, by its treatment of the issue, added a further question to the case. Its decision held in effect that the defendants "caused" the mailings up to the point when the Baton Rouge bank paid the $75,000.00 out of the Louisiana State University bank account. Such theory would have held the defendants liable under Count 1 of the indictment, relating to the mailing of the cash letter from the federal reserve branch in New Orleans to the Baton Rouge bank. But it could not have also embraced the subsequent acknowledgment of the cash letter by the Baton Rouge bank *after it paid the check,* which is the the basis of Count 2. Under its own reasoning, the Circuit Court of Appeals should have reversed the conviction of defendants and the sentences imposed under Count 2.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The reasons relied on for the allowance of a writ of certiorari are:

1. That the constitutional and statutory rights of the petitioners have been infringed by conviction for using, or causing the mails to be used in furtherance of a scheme to defraud, when none of the defendants used the mails themselves, and no agent or agency of the defendants used the mails in furtherance of the alleged scheme, and when the mails were not used by the defendants, their agents, or by any one else until after the money charged to be the object of the fraud had been received and collected by the defendants.

2. That the constitutional and statutory rights of the petitioners have been infringed by conviction for using or causing the mails to be used in furtherance of a scheme to defraud, when the trial court charged the jury that the petitioners could be held criminally responsible for a mailing under the theory of "causation", and that the petitioners could be criminally responsible for such mailing even where they did no mailing themselves or by means of or through any agent, and when there was a mailing by a person admittedly not an agent of the petitioners and in no way connected with them.

3. That the constitutional and statutory rights of the petitioners have been infringed by conviction for using or causing the mails to be used in furtherance of a scheme to defraud when the indictment charged that the mails were used by certain named banks as agents of the peti-

tioners, and the trial court instructed the jury that this allegation in the indictment charging petitioners with using the mails in furtherance of a scheme to defraud through named agents, was surplusage, and that they did not act through the persons named as agents in the indictment, and that the persons named in the indictment were not and could not have been the agents of the petitioners.

4. That the constitutional and statutory rights of petitioners have been infringed by a conviction for using or causing the mails to be used in furtherance of a scheme to defraud, where the petitioners, upon the trial of the case, requested the trial court to charge the jury that the government must prove, beyond a reasonable doubt, that the accused had used, or caused the mails to be used in the furtherance of a scheme to defraud through certain agents named in the indictment, which special charge the trial court refused to give, but on the contrary charged the jury that such part of the indictment alleging that petitioners had used the mails through named agents was surplusage and could be entirely disregarded by the jury.

5. That the constitutional and statutory rights of the petitioners have been infringed by a conviction for using or causing the mails to be used in furtherance of a scheme to defraud, as a result of the affirmation of the entire verdict and sentence of the trial court by the Circuit Court of Appeals for the Fifth Circuit, when said Circuit Court of Appeals found in its own opinion that the offense had been completed before the letter, made the basis of the second count, had been mailed, but did not set the conviction under the second count aside.

TRANSCRIPT ANNEXED.

The record having been printed for the use of the court below (Rule 38, paragraph 7), and the necessary copies so printed being furnished, your petitioners now file herewith ten copies of the record as printed below, together with the proceedings and opinion in the Honorable Circuit Court of Appeals for the Fifth Circuit, and due certificate thereon of the Clerk of said Court.

SUPPORTING BRIEF.

Petitioners also file herewith and make part of this application their brief in support hereof.

PRAYER.

Wherefore, petitioners respectfully pray that a writ of certiorari may issue to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be in due course reversed and set aside, and that judgment may be rendered in favor of petitioners, setting aside their conviction and sentences pronounced below, and discharging them forthwith; and petitioners pray for all further and necessary orders proper in the premises, and for all such relief as the nature of the case may justify.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Outstanding in importance in this case, not only to the liberty of the appellants themselves, but also to the state of the jurisprudence, is the question of whether, under the circumstances of the particular banking transaction involved, *there was a use of the mails within the meaning of the mail fraud statute.*

We respectfully say that this question has been not only erroneously, but inadequately dealt with in the judgment of the Circuit Court of Appeals.

When the prosecutor investigated the Bienville Hotel sale and contemplated a federal court indictment in connection therewith, he found no use of the mails which he could act upon *related to the alleged fraud.* The best he could do was to begin *after* the time when Hart, in all practical as well as legal effect, had sold the $75,000.00 check to the City Bank in New Orleans. This left, for the prosecutor to rely upon, only the subsequent mailings in connection with the bank clearings between New Orleans and Baton Rouge (of the check then owned by the City Bank).

Knowing then, and as we know now, and as we think this Court should reaffirm now, that there can be no responsibility for crime save for an act knowingly done by a person himself or through his agent, collusive or

innocent, the prosecutor wrote in this indictment (Record, Vol. I, page 8) that in clearing the $75,000.00 check through the mails, the Federal Reserve Bank acted "as agent for the defendants herein", and he undoubtedly meant an "innocent agent."

But, by so doing, the prosecutor pleaded in the very teeth of *Burton vs. United States*, 196 U. S. 283, in which the Supreme Court of the United States has laid down the rule, universally accepted today, that when a payee deposits a check in ordinary course in a bank (the case must be even stronger where he cashes it) the bank becomes the owner thereof. Said the Supreme Court: "It (the bank) was IN NO SENSE the agent of the defendant for the purpose of collecting the amount of the check from the trust company on which it was drawn." (Italics ours.)

The *Burton* case was a criminal case. It was absolutely on all fours with the case at bar on the point of the non-representative capacity of the bank in clearing the check involved, and its language has never been contradicted or qualified in over 35 years. It is the leading case in all American jurisprudence on the subject today. The prosecutor and the trial judge could not ignore it. They had to get around it.

BANK COULD NOT BE AGENT.

This was accomplished by freely conceding in the charge to the jury that the predicate of the indictment was "surplusage" and an error, that the City Bank "became

the owner of said check and subsequently said bank could not in the strict legal sense have acted as defendants' agent in the collecting of their own check. You are therefore instructed to treat this charge of agency as "surplusage" (Record, Vol. II, page 1011).

It will be noted that, in an identical legal situation in the *Burton* case, the United States Supreme Court said that the bank could be "IN NO SENSE" the agent of defendant. Judge Borah trimmed the language of the Supreme Court just enough to get the government's case under the jurisdictional wire. He said the bank could not in "THE STRICT LEGAL SENSE" have been the defendants' agent. The Supreme Court was all-exclusive against the existence of an agency. Judge Borah left the door open just wide enough for something which he indicated need not be a "strict legal" appreciation of agency.

What was this not-such-a "strict legal sense" of criminal agency which the charge of Judge Borah resorted to? Which he resorted to despite the United States Supreme Court's language in the *Burton* case. And by which he gave the jury the opening it needed to hold that this was a mail fraud case.

That not-such-a "strict legal sense" of agency turned out to be what Judge Borah defined to the jury as "causation."

Judge Borah's charge on causation has produced, we think, a new and novel idea that there can be in criminal law a chain of causation *without an agent*.

In other words, that there can be criminal responsibility other than that existing from a knowing act, effected personally or through an agent, collusive or innocent, contrary to the fundamental rule on human responsibility for crime.

Or, to state it another way, that one who is debarred by a legal rule from being an agent, can still be an agent.

But in order to phrase such a charge on "causation", Judge Borah, just as he had "fudged" a bit (and we use the expression respectfully) on the language of the United States Supreme Court in the *Burton* case, had to "fudge" a bit more on the language of the rule generally expressed in the jurisprudence of "causation". At the top of page 1010, Vol. II, of the Record, we find that Judge Borah, in charging the jury on causation, used the language, with one slight but very significant addition, which had been used by Judge (late Justice) Van Devanter in deciding the *Demolli* case, 144 Fed. 363. In the *Demolli* case that language read:

> "Nor is it essential to the commission of the offense that the objectionable matter be deposited in the mail by the offender himself, or by another acting under his express direction, because he is equally responsible if it is deposited therein as a natural and probable consequence of an act intentionally done by him with knowledge at the time that such will be its natural and probable effect."

Judge Borah charged the jury in the case at bar as follows (added words italicized):

> "With reference to this question of causation you are instructed that it is not essential to the commis-

> sion of the offense that the check, letter or writing be deposited in the mail by the defendant himself *or by an AGENT* or another acting under his express direction, because he is equally responsible if it be deposited therein as a natural and probable consequence of an act intentionally done by him with knowledge at the time that such will be its natural and probable effect."

Plainly stated, what Judge Borah has done in this case was to tell the jury that the banks could not be defendants' agents in clearing the $75,000.00 check, but that this made no difference because "causation" could be effected *without even an "agent"*.

CAUSATION ONLY THROUGH AGENT.

Up to the moment Judge Borah spoke, the *Demolli* case, and all the other cases on the subject, had stood for the proposition that "causation" could result without the defendant's personal act, or an act of another by his express direction; but we think it has always been recognized and still must be recognized that "causation" cannot result in the absence of any agent", albeit an innocent agent. Otherwise the basic principle of law on the extent of criminal responsibility which we have already cited has become meaningless. Yet Judge Borah told this jury that causation could result without even *any kind of agent,* innocent or otherwise; and he gave the jury that instruction because he also was obliged to tell them that the only intervening party in the mailings, the bank, could not, under the *Burton* case, be such an agent—*"in no*

sense", had said the United States Supreme Court in the *Burton* case.

Judge Borah dispensed with any "agent" in his doctrine of "causation" of the mailings, since the jury had to be told the bank could not be an agent, *and there was no other possible agent for the mailings in the case*, and an acquittal must have resulted from a correct statement of the law, properly followed by the jurors.

This dispensing with the necessity for any agent, under the trial court's own peculiar doctrine of "causation" of mailing, was, of course, error. It was a substantial error, one which persisted from the overruling of the defendants' demurrer, through the refusal of a direct verdict and the charge to the jury down to the denial of a new trial and arrest of judgment. It was an error which has been repeated by the Circuit Court of Appeals in its judgment, holding that (page 6 of the printed judgment) "this case is different" (from the Burton case), when there is not the slighest difference in the legal principle on the agency in the mailings.

The holding that mailings in violation of the mail fraud statute could have taken place, under the facts existing in this case, and for the reasons set forth in the trial court's charge, was clearly error, and the Circuit Court of Appeals has given new life of reported precedent to that error.

See also *City of Douglas vs. Federal Reserve Bank*, 271 U. S. 489.

We respectfully submit that the trial court's holding on this point is contrary to these decisions of the United States Supreme Court.

The ruling that the mere cashing of a check is in itself "causing the mails to be used" within the purview of the Mail Fraud Statute because the bank cashing the check, and thus becoming the owner of it, may, in subsequent dealings with its own property, use the mails in the customary course of business, after the object of the alleged scheme has been accomplished, is such an extension of the scope of the penal statute of the United States and so far beyond anything intimated in any decisions of the Supreme Court of the United States that the Circuit Court of Appeals should not have attempted to expand this penal statute as it did in its opinion of May 24, 1940. As the Supreme Court of the United States stated in *United States vs. Brewer,* 139 U. S. 278-288:

> "Before a man can be punished, his case must be plainly and unmistakably within the statute, United States v. Lacher, 134 U. S. 624."

We respectfully submit that this case of petitioners is not clearly within the statute; that this Court erred in failing to follow the *Burton* and *City of Douglas* cases.

AGENCY INSEPARABLE FROM "CAUSATION."

The element of an agency through which the defendant acts, whether that agency be collusive or innocent, is as inseparable from and indispensable to the third-person

mailing of a letter to execute a fraud, as it is inseparable from and indispensable to the general rule of horn-book law that any criminal act must be done either by one's self or through an agent, though the latter may act innocently. It is solely through the principle of agency that acts or declarations of others can be admissible against a defendant, each member in a common unlawful undertaking being constituted the agent of the others in the eyes of the criminal law. (*Hitchman Coal & Coke Co. vs. Mitchell*, 245 U. S. 229, 249.)

The moment the element of "agency" is lacking, criminal responsibility of the alleged principal ceases *in every way.*

For a trial judge to conduct a case upon the judicial view, or to instruct a jury, that criminal responsibility can flow to an accused from the act of a third person, to the extent that it is not even essential for that third person to have acted as the agent of the accused in the doing of the alleged criminal act, would be to break down the limitations which the law has always placed upon human responsibility for crime and throw the door open wide to jury-room conclusions that one man can be guilty of the independent act of another.

This is exactly what has been done in the case at bar.

To re-state the point, the jurors were told, as they had to be, that the banks could not have acted as Hart's agents in the clearing of the check; but, since there could not have been any other agent, the jurors were improperly told that Hart and his co-defendants could have committed the crime *without any agent,* that it was not essential to the commission of the offense (Record, Vol. II,

page 1010) that the check, letter or writing be deposited in the mail by the defendant himself OR BY AN AGENT or another acting under his express direction."

Absence of the element of a necessary agency was explained away under the theory of "causation", or the "natural and probable consequence" rule, without regard to the fact that even in a chain of causation or natural and probable consequence, the accused must still act by the hand of an agent, or not at all. *Absent the agency, absent the crime.*

Where the prosecution in the instant case bumped its head against the proverbial brick wall (and yet, so far successfully) was that where a check is sold outright (or even sold by unrestricted deposit) necessary considerations in the law have compelled the courts to reason that the check necessarily becomes the property of the bank, and what it does with the check from that moment is the will of the bank, from which no other person can derive any contradictory rights and, conversely, for which no other person can be made to suffer responsibility.

Hence, the bank in clearing the check, either in the *Burton* case, or in the case at bar, "in no sense" could have been the agent of the defendants.

But the prosecution was almost fanatical in the case at bar to retain federal jurisdiction through the mail fraud statute, so it urged the contention that crime could be "caused" by the hand of a third person even where the existence of the element of agency was prohibited by

law; in other words, that an independent, intervening will could carry out the defendant's alleged criminal act, simply because that independent intervening will, unconscious of the alleged criminal nature of the act, proceeded independently of the defendant, legally and practically, to do something which might have been expected in usual course by the defendant at the inception of the transaction, but which the independent, intervening will could have refrained from at choice, and did at its own volition, and "in no sense" as the agent of the accused.

This insistence in pleading "causation" in defiance of non-existence of agency (which had to be and was charged out of the case), found its sympathetic echo in the charge of the court, by engrafting words on the *Demolli* decision, that "agency" was not essential to causation.

For a court to hold that Hart "caused" a crime to be committed, where letters were placed in or taken from the mails by persons who the trial judge had to charge could not under the law be his agents, is a veritable contradiction in terms.

"Cause", as used in the mail fraud statute, means that the defendant intentionally employed an agent, innocent or otherwise, to place the letter in the mail. To say that the defendant "caused" the act, but that the person who placed the letter in the mail could not have been the defendant's agent is to state two irreconcilable propositions, each destroying the sense of the other.

In fact, up to the time of Judge Borah's charge, there has never been a case, as far as we can find, wherein

"causation" was ever disassociated from "agency". Take the *Kenofskey* case, 243 U. S. 440, so heavily relied upon by the prosecution.

"Cause" was defined by Mr. Justice McKenna in the *Kenofskey* case as follows:

> " 'Cause' is a word of very broad import and its meaning is generally known. It is used in the section in its well-known sense of bringing about, and in such sense it is applicable to the conduct of Kenofskey. He deliberately calculated the effect of giving the false proof to his superior officer, and the effect followed, demonstrating the efficacy of his selection of means. It certainly cannot be said that the superintendent received authority from the insurance company to transmit to it false proofs. *He became Kenofskey's* agent for that purpose and the means by which he offended against the statute. Demolli v. U. S., 144 Fed. 363." (Italics ours.)

In *Sallinger v. Loisel,* 265 U. S. 224, 234, Mr. Justice Van Devanter, in discussing the third clause of Section 215, making it an offense for the deviser of the fraudulent scheme to cause a letter to be delivered by mail according to the direction thereon, states:

> "A letter may be mailed without being delivered but if it be delivered according to the address, the person who causes the mailing causes the delivery. Not only so, but the place at which he causes the delivery is the place at which it is brought about in regular course *by the agency which he uses for the purpose.* U. S. v. Kenofskey, 243 U. S. 440, 443."

In *Demolli v. U. S.*, 144 Fed. 363, where the use of the mails to transmit obscene matter was involved, Mr. Justice Van Devanter (then a Circuit Judge) held that the defendant caused the matter in question to be deposited in the mails because "He set in operation and *made use of an agency* which, as he knew at the time, would, according to its established and regular course, carry the objectionable matter through the mails to the person to whose attention he designed it should be brought * * *."

"Cause" as used in the Mann Act, punishing any person who shall "cause" the transportation in interstate commerce of any woman for immoral purposes means *"to effect a thing as an agent, to bring it about." Huffman v. U. S.*, 259 Fed. 35.

"Cause" as defined in Black's Law Dictionary, Third Edition, is *"to effect a thing as an agent; to bring it about. Huffman v. U. S.*, (C. C. A.) 259 F. 35, 38; *Shea v. U. S.*, (C. C. A.) 251 F. 440, 447."

"Cause" as defined in Webster's new International Dictionary, Second Edition, is "to be the cause or occasion of; *to effect as an agent; to bring about;* to bring into existence; to make."

As said by the Court in *Machette v. U. S.*, 90 Fed. (2) 462, 464:

> "Appellant Hanecy placed the Voelker check for $2,500.00 described in the first count of the indictment, with the Marshall & Illsley Bank of Milwaukee *for collection*, and by so doing the bank became *his*

agent and he became responsible for any use of the mails which the bank employed in making collection. Spear v. U. S., (C. C. A.) 228 F. 485. Likewise, all others who were engaged in the conspiracy or who were partners of Hanecy in the joint enterprise, including appellant, Machette, were responsible for the use of the mails by the bank. U. S. v. Bender, et al., (C. C. A.) 60 F. (2) 56."

As stated by the Court in *Spear v. United States,* 246 Fed. 250, 251:

"The drafts and checks had been received from the victims of the fraudulent scheme by those actively engaged in conducting it. The latter turned them over to Spear and he delivered them to a local bank *for collection. The bank did not cash them, but accepted them for collection.* Part of the scheme was to keep the victims quiescent until reports of payment were received. Collection of the drafts and checks was essential to the full consummation of the fraud, and the evidence of Spear's guilty assistance was sufficient. When he intrusted them to the bank *he made it his agent,* although it was innocent of the fraud. U. S. v. Kenofskey, 243 U. S. 440. The draft and checks were drawn on banks in distant cities. The custom among banks, almost invariably is to forward such collection items by mail with letters of transmittal, and Spear must have known the local bank would follow the ordinary course in the absence of instructions to the contrary. When the bank deposited the letters of transmittal in the mails, Spear, in legal effect, caused them to do so. U. S. vs. Kenofskey, 243 U. S. 440."

It is to be noted that the defendants' responsibility for "causing" the use of the mails employed by the bank in

collecting the drafts and checks is predicated solely upon the operation of the principle of agency, the court holding that the bank, although innocent of the fraud, was the agent of Spear in collecting the drafts and check. It is also to be noted that the court, in its opinion, was particular to emphasize the fact that "*the bank did not cash them* but accepted them for collection", thus clearly indicating that its decision would have been different had the drafts and check been cashed by the bank and not accepted for collection, as in the instant case.

In each of the following cases the responsibility of the defendants for "causing" the use of the mails employed by a bank in forwarding a check received by them *for collection* was based solely upon *the operation of principal and agent; Spear vs. U. S.*, 228 F. 485, 488; *Spear vs. U. S.*, 248 F. 250, 251. *Tincher v. U. S.*, 11 F. (2) 18, 21. *Machette v. United States*, 90 F. (2) 462, 464. *Goodman v. U. S.*, 97 F. (2) 197, 199. *Smith v. U. S.*, 61 F. (2) 681, 684. *Mazuroskey v. U. S.*, 100 F. (2) 958. *Corbet v. U. S.*, 89 F. (2) 124.

The Circuit Court of Appeals based its finding that "Hart clearly caused the mails to be used in furtherance of the scheme to defraud" upon the fact that "when Monte Hart presented the check to City Bank Branch it could be reasonably foreseen that in the usual course of events the check would pass through the United States mails to Baton Rouge to be paid." It is to be noted that the Court in reaching its conclusion utterly disregarded the salient fact that when Monte Hart presented the check to the City Bank Branch *the bank cashed the check and did not receive it for collection.* The Court by such find-

ing made knowledge, that is, whether the use of the mails may fairly be foreseen, the final and all-inclusive test of the violation of the statute.

"However", as said by Judge Foster in *Spillers v. U. S.*, 47 F. (2) 894, "it is not every incidental use of the mails that occurs as a result of the scheme that would constitute a violation of the law. The letter must be knowingly mailed or be caused to be mailed in furtherance of the scheme by the defendant." It is only after the proof shows that a defendant mailed or caused a letter to be mailed in furtherance of a scheme to defraud that we need go into the question of knowledge, that is whether the steps taken to execute the fraudulent scheme did under the circumstances known to the defendant naturally and probably result in the use of the mails.

LETTERS NOT MAILED IN FURTHERANCE OF SCHEME TO DEFRAUD.

When Hart presented the $75,000.00 L. S. U. check to the City Bank Branch, the bank cashed the check, and thereby became its owner. The letter containing the check was placed in the mails to be forwarded to the bank upon which it was drawn so that the check might be paid. Payment was sought by the Whitney Bank for itself as owner. The final payment of the check by the City National Bank at Baton Rouge was a payment, not to Hart, but to the Whitney Bank. At the time the letter was deposited in the mail Hart had no interest in the check, having sold it to the Whitney Bank and received its face amount, the $75,000.

The act of the Whitney Bank in causing the check to be placed in the mail to be forwarded to the bank upon which it was drawn, for the purpose of obtaining payment for the paper which it had purchased from Hart, as held in *U. S. v. Burton*, "can in no sense be said to be an action of an agent for its principal, but the act of an owner in regard to its own property." The check was sent forward to be paid and the Whitney Bank was its owner at the time. The letter was placed in the mail to further the interests of the Whitney Bank, that is to collect its own check, and not in furtherance of the scheme to defraud charged to have been devised by Hart and the other defendants.

Had Hart, on the other hand, presented the $75,000 L. S. U. check to the City Bank Branch for collection, in that case the bank would have been *his agent* for the purpose of collecting the amount of the check from the bank upon which it was drawn.

In that case the check would have been placed in the mail by the Bank to obtain payment of the check *for Hart*.

In that case the collection of the check would have been essential to the full consummation of the fraud.

In that case the final payment of the check by the City National Bank at Baton Rouge would have been a payment to the Whitney Bank *as agent for Hart*.

In that case the Whitney National Bank would not be the owner of the check but *the agent of Hart*.

In that case the letter would have been placed in the mail to further the scheme to defraud, and in that case Hart would have caused the letter to be placed in the mail in furtherance of the scheme to defraud.

The Circuit Court of Appeals, in overruling the defendants' contention that when Hart presented the $75,000 L. S. U. check to the Whitney National Bank, the Whitney National Bank cashed said check, the scheme to defraud was at an end, stated as follows:

> "This case is different. The scheme here set out in the indictment and proved at the trial was one to defraud Louisiana State University, not one to defraud the Whitney Bank. The scheme to defraud was not at an end when Hart indorsed and presented the check to the bank for no one had yet been defrauded. Louisiana State University and Agricultural and Mechanical College, the State and its taxpayers, sustained no actual loss until the check had been finally paid, and it is clear that before the L. S. U. account was charged with this item the University might have intervened to stop payment and the fraudulent scheme would have been frustrated."

It is evident that the Circuit Court of Appeals, in so holding, overlooked the fact that the bank, by cashing the check and paying to Hart its face amount, became a *bona fide* holder for value of said check. It is elementary that the drawer of a check has no legal right to revoke his check, that is "stop payment", after the instrument has passed into the hands of a *bona fide* holder for value. Fraud relating to the consideration for which the instrument was given is never a defense in an action thereon by a *bona fide* holder in due course. *While the scheme*

was not at an end when Hart endorsed and presented the check to the bank, it was at an end when the bank cashed the check for Hart. While the Louisiana State University sustained no actual loss until the check was finally paid, the moment the check was cashed by the Whitney National Bank it became liable to the bank for the amount of the check and at that very moment the defendants collected the spoils of their alleged fraud and the scheme, as to them, was fully consummated and at an end.

Had the University intervened, and without legal right stopped payment on the check, it could not have stopped its liability to the Whitney National Bank upon the check. The fraudulent scheme would not have been frustrated by such intervention. The fraudulent scheme was fully consummated, and the spoils of the alleged scheme fully realized, upon the sale of the check by Hart and its purchase by the bank.

It is clear that Louisiana State University could not stop payment on its check after the check had come into the hands of a third person for value received, but would have been compelled to seek recourse against the original holder, and against him alone.

The Circuit Court's opinion is obviously in error in this respect and contrary to and in conflict again with the jurisprudence of the United States Supreme Court.

U. S. vs. Guarantee Trust Co., 293 U. S. 340;
U. S. vs. National Exchange Bank, 270 U. S. 527;
Burton vs. United States, 196 U. S. 283.

Inasmuch as the letters charged to have been caused to be placed in the mails by the defendants in furtherance of the scheme to defraud were placed therein after the check was cashed and the alleged scheme fully consummated, it is clear that said letters could not be in furtherance of the scheme to defraud. Therefore even though the use of the mail by the Whitney Bank in collecting its own check were chargeable to the defendants, such use would not constitute a violation of the statute.

On the other hand, whether the alleged scheme was completed or not by the cashing of the check, *the unanswerable proposition still faces your Honors that the banks "in no sense" could* have been the agents of Hart, and the so-called chain of "causation" cannot exist save through the intervention of an agent, even though he be an innocent agent.

THIS WAS ALSO AN IMPROPER AMENDMENT OF INDICTMENT.

We have shown that the indictment as returned by the grand jury charged that the defendants had caused the two mailings complained of in the two counts through the federal reserve branch and the Baton Rouge bank, *acting as agents of the defendants.*

We have shown that, in the face of the grand jury's finding, the trial judge told the jurors they could ignore this averment of the indictment as "surplusage".

Petitioners, accordingly, were convicted of an offense not set out in the indictment and not committed in the manner and form set out in the indictment; and, therefore, there was a fatal variance between the allegations of the indictment and the proof offered to support the same, to the extent that your petitioners were convicted of committing an offense in a manner and form different from the manner and form charged in the indictment.

Petitioners respectfully submit that, in affirming the action of the trial judge on this point, the Circuit Court of Appeals differed from and was in conflict with the following decisions of the federal courts:—*Ex Parte Bain*, 121 U. S. 1; *Vann vs. U. S.*, 76 F. 809; *Naftzger vs. United States*, 200 F. 494; *Norris vs. U. S.*, 281 U. S. 621, 74 L. E. 1076.

In the syllabus of the *Bain* case, the United States Supreme Court said:

> "When this indictment is filed with the Court no change can be made in the body of the instrument by order of the court or by the prosecuting attorney, without a resubmission of the case to the Grand Jury. And the fact that the court may deem a change immaterial, as striking out of surplus words, makes no difference. The instrument is thus changed, it is no longer the instrument of the Grand Jury which presented it."

And on page 4 of the *Bain* case opinion, the United States Supreme Court said:

> "The learned Judge goes on to argue that the Grand Jury would have found the indictment without this

> language, but it is not for the Court to say whether they would or not, the party can only be tried on the indictmnet as found by such Grand Jury and especially upon its language found in the charging part of that instrument."
>
> *Ex Parte Bain, 121 U. S. 1, 30 L. E. 849;*
> *U. S. vs. Alfred E. Norris, 281 U. S. 621, 74 L. E. 1076.*

The defendants requested a special charge that the burden was on the government, under the indictment, to prove that the banks in question were the agents of the defendants in causing the use of the mails. The trial court, instead of giving the requested special charge, instructed the jury that it was not necessary for the government to prove essential averments in the indictment, and that the banks were not the agents of the defendants, and that the jury should treat that allegation of agency as surplusage; the judge thereby not only instructing the jury that they could convict defendants of an offense not set out or alleged in the indictment, but also substituting himself for the grand jury by amending the indictment.

The Trial Court having found from the evidence that there was no agency existing between the defendants and the City branch of the Whitney National Bank, the Whitney National Bank and the New Orleans branch of the Federal Reserve Bank should have instructed the jury that a substantial and necessary element of the offense charged in the indictment had not been proven by the Government, and that, therefore, a verdict of not guilty should be rendered.

The Trial Court having found that the substantial and necessary element of the offenses as charged in the indictment found by the Grand Jury had not been proven by the Government fatally erred in amending the indictment by eliminating that part of the indictment referring to the relation of agency existing between the defendants and various banks, and instead of amending the indictment and treating these averments of the indictment as surplusage, should have instructed the jury that the Government had failed to establish its case as laid in the indictment, and should have directed a verdict of acquittal. More especially is this true since the defendants depending upon their right to be tried and to defend against the crime as described and set forth in the indictment, requested the following special charge from the Court covering the allegations of agency in the indictment:

> "I charge you that the burden of proof is upon the Government to prove beyond a reasonable doubt that the City Bank Branch of the Whitney National Bank in New Orleans, the Federal Reserve Bank in New Orleans, and the City National Bank of Baton Rouge, Louisiana, were the agents of the defendants in forwarding checks or letters as alleged in the indictment." Assignment of Errors No. 14 (Record 2, page 1020).

As above stated the defendants believed that they were being tried upon the offense committed through agents and they continued to so believe until after all the evidence had been heard and their special charges were handed to the Court for its consideration and were taken entirely by surprise when the Court, instead of giving the charge above quoted, charged the jury that it was not

necessary for the Government to prove essential averments in the indictment, and that the banks were not the agents of the defendants and that the jury should treat that allegation of agency as surplusage; thereby not only instructing the jury that they could convict defendants of an offense not set out or alleged in the indictment, but also substituting himself for the Grand Jury by amending the indictment.

If the judge had given the special charge requested, as the defendants had a right to expect he would, and the government had not proven the agency beyond a reasonable doubt (and the trial court found and charged the jury that the evidence showed that the relation of agency *did not* exist between the defendants and the banks) then the defendants would have, undoubtedly, been entitled to an acquittal; and the court holding the view, as it did, that the government had failed to prove the agency as laid in the indictment should have directed a verdict of not guilty.

Not only should the verdict of not guilty been directed under the trial court's own finding of the fact, but it should have also been directed because the proof was at variance with the allegation of the indictment, and the amendment of the indictment was illegal and beyond the power and authority of the court.

U. S. vs. Vann, 76 Fed. 809.

THE MAILING UNDER THE SECOND COUNT.

The Circuit Court of Appeals has found that the crime if any was committed, was consummated and ended when the check was presented to the City National Bank of Baton Rouge for payment.

> "Louisiana State University and Agricultural and Mechanical College, the State, and its taxpayers, sustained no actual loss until the check had been finally paid, and it is clear that before the Louisiana State University account was charged with this item the University might have intervened to stop payment and the fraudulent scheme would have been frustrated." (Opinion.)

The letter of acknowledgment (of the cash letter), which is the basis of the second count, was not mailed until after the check had been presented to the City National Bank of Baton Rouge, and honored, and the amount charged to Louisiana State University. Therefore, under the Circuit Court's own opinion, the fraud, if any, was consummated and ended; and the mailing of the letter of acknowledgment, which is the basis of the second count, could not have been in furtherance of the perpetration of the scheme to defraud set out in the indictment.

We submit that the second count is fatally defective under the opinion of the Court of Appeals, and under any view of the case, the conviction and sentence under that second count should be set aside.

CONCLUSION.

Important as this case is to the lives and careers of the appellants themselves, it has become almost of greater importance in the legal history of the nation.

It represents today the peak point of the encroachment of federal jurisdiction upon local crime through mail fraud prosecution. The government's success in the case thus far, as we have tried to indicate in the foregoing brief, has resulted from a process of nibbling a favorable point here and there until the whole picture is given what appears to be a favorable complexion.

From the declaration of Mr. Justice Peckham in the *Burton* case that the bank could be "in no sense" the agent of the defendant in the mailing of the check, we have inched a little further to the statement of Judge Borah that the bank could not, "in the strict legal sense" be such an agent.

From the logic of the probable consequence rule as laid down by Mr. Justice McKenna in the *Kenofskey* case, that "causation" existed because the insurance company superintendent "became Kenofskey's agent" for the purpose of mailing the false proofs, we have again inched forward to Judge Borah's jury instruction that an agent is not essential to "causation".

We respectfully urge that the issues raised by this case are serious and important ones, that the errors of law

complained of present rulings contrary to the established jurisprudence of the United States Cupreme Court, and that, to the end that those errors may be rectified, a writ of certiorari should issue.

Respectfully submitted,

WARREN DOYLE,
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Attorneys for Petitioners.

No. 322

IN THE

Supreme Court of the United States

October Term, 1940.

MONTE E. HART, JAMES MONROE SMITH, J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LESAGE,

vs.

UNITED STATES OF AMERICA.

Notice of Motion for Leave to File Additional and Supplemental Petition of J. Emory Adams, Seymour Weiss and Louis C. LeSage for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

HUGH M. WILKINSON,
DAVID V. CAHILL,
JOHN R. HUNTER,
ROLAND C. KIZER,
Attorneys for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1940.

MONTE E. HART, JAMES MONROE SMITH, J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LESAGE,

vs.

UNITED STATES OF AMERICA.

Notice of Motion.

To the Honorable Francis Biddle, Solicitor General of the United States, for the Respondent:

PLEASE TAKE NOTICE that on the 7th day of October, 1940 at the opening of court on that day a motion for permission to file an additional and supplemental petition for a Writ of Certiorari herein will be submitted for consideration.

Three printed copies of the additional and supplemental petition is served upon you herewith.

It is suggested for the record that since the filing of the original petition and brief the petitioner, MONTE E. HART, has died.

Dated, New York, N. Y., September 26, 1940.

Yours, etc.,

HUGH M. WILKINSON,
DAVID V. CAHILL,
JOHN R. HUNTER,
ROLAND C. KIZER,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1940.

No. 322.

J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LESAGE,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Additional and Supplemental Petition of J. Emory Adams, Seymour Weiss and Louis C. LeSage for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Argument in Support Thereof.

HUGH M. WILKINSON,
DAVID V. CAHILL,
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Attorneys for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1940.

J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LESAGE,
Petitioners,

vs.

UNITED STATES OF AMERICA.

Additional and Supplemental Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered May 24, 1940 (R., 1785) affirming a judgment of conviction for using the mails in furtherance of a scheme to defraud.

Opinion Below.

There was no opinion in the District Court for the Eastern District of Louisiana in which the case was tried. The opinion of the Circuit Court of Appeals (R., 1779-1785) is reported in 112 F. (2d) 128.

Jurisdiction.

The jurisdiction of this court is invoked under Section 24a of the Judicial Code as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.). The judgment of the Circuit Court of Appeals was entered May 24, 1940 (R., Vol. 4, p. 1780).

Within the prescribed time two petitions for writs of certiorari were filed, one on behalf of petitioners, MONTE E. HART, J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LESAGE, and the other on behalf of MONTE E. HART alone. It is respectfully suggested for the record that the petitioner, MONTE E. HART, has died since the filing of the petitions. Leave is now being asked on behalf of the remaining petitioners, J. Emory Adams, Seymour Weiss and Louis C. LeSage to file this additional and supplemental petition, presenting in more concise form the reasons for granting the writ and arguments therefor, and additional grounds and arguments not contained in the prior petition. An application is being made simultaneously with the presentation of this petition for its consideration.

Questions Presented.

1. Whether the petitioners caused a check to be placed in the mails for the purpose of executing the scheme charged, where a bank, which had cashed the check for one of the defendants, used the mails for the sole purpose of obtaining payment for itself of the paper which it had purchased.

2. Whether a defendant may cause and be criminally responsible for the act of another where the relationship of principal and agent does not exist.

3. Whether intent to use the mails is an essential element of the crime charged where the indictment al-

leges that the scheme devised "was to be effected by the use and misuse of the post office establishment of the United States" (R. 4-13).

Statute Involved.

The pertinent provisions of the Mail Fraud Statute (Sec. 215, Criminal Code; U. S. C. A. Title 18, Sec. 338) are as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, * * * or shall knowingly cause to be delivered by mail according to the direction therein, * * * any such letter, * * * shall be fined not more than $1,000, or imprisonment not more than five years or both."

Statement.

The indictment in two counts alleges that the defendants devised a scheme and artifice to defraud Louisiana State University, the State of Louisiana and the tax payers of the State of Louisiana, "which said scheme and artifice to defraud was to be affected by the use and misuse of the post office establishment of the United States" and did use the mails and did cause them to be used in furtherance of said scheme (R., 4-13). The one fraudulent allegation, which apparently constituted the essential element of the scheme, is that petitioners collected $75,000.00 from Louisiana State University on the representation that the University was obtaining certain equipment and furniture as the consideration of that sum, whereas in fact it would not receive that consideration.

The evidence as to the use of the mails is undisputable. The defendant Hart received from Louisiana State University, in payment of the furniture, its check for $75,000.00 drawn on the City National Bank of Baton Rouge and payable to the National Equipment Company, Inc. (R., 459; Ex. G-5, R., 1043). Hart and F. E. Ames, President and Vice-President, respectively, of said company unrestrictedly endorsed the check. Hart then cashed the check at the City Bank Branch of the Whitney National Bank in New Orleans and the sum of $75,000.00 in currency was handed to him by the bank. On the same day, the City Bank Branch sent the check, by messenger, to the main office of the Whitney National Bank. The next day, the Whitney National Bank delivered the check, by messenger, to the Federal Reserve Bank in New Orleans (R., 516, 537-541). The Federal Reserve Bank thereupon forwarded the check and a certain cash letter amounting to $144,004.82 including the $75,000.00 as one of many items by mail to the City National Bank at Baton Rouge (R., 551, 560, 563, Ex. G-64-R., 1341). The act of the Federal Reserve Bank in placing the cash letter and check in the mails is made the basis of the first count of the indictment. The day after the receipt of this check and cash letter, the City National Bank of Baton Rouge mailed a letter to the New Orleans Branch of the Federal Reserve Bank, acknowledging receipt of the cash letter and authorizing the charging of its account with that amount (R., 568-570, Ex. G-65, R., 1352). The delivery of this letter by mail, to the New Orleans Branch of the Federal Reserve Bank is made the basis of the second count of the indictment.

The indictment further alleges that the City Branch of the Whitney Bank and the Whitney Bank, as agents of the defendants, transmitted the check to the Federal Reserve Bank, and that the Federal Reserve Bank, as agent of the Whitney Bank and of the defendants, and "in order to effect payment of said check, forwarded said check"

by mail to the City National Bank of Baton Rouge (R., 4-13).

The Trial Court instructed the jury that the City Bank Branch of the Whitney Bank, by cashing the check "thereby became the owner of said check and consequently said bank could not in the strict legal sense have acted as defendants' agent in the collecting of their own check", and directed the jury to treat as surplusage the charge contained in the indictment "that the New Orleans bank acted as the defendants' agent for the collection of this check" (R., Vol. 2, pp. 1010-1011). The court thereupon instructed the jury that with this question of agency removed from their consideration, they were "still obliged to determine whether or not the use of the mails was caused by the defendants" (R., 1011).

The court had previously instructed the jury upon "causation" as follows:

> "With reference to this question of causation you are instructed that it is not essential to the commission of the offense that the check, letter or writing be deposited in the mail by the defendant himself or by an agent or another acting under his express direction, because he is equally responsible if it be deposited therein as a natural and probable consequence of an act intentionally done by him with knowledge at the time that such will be its natural and probable effect" (R., 1010).

All the defendants were convicted upon both counts of the indictment.

Reasons for Granting Writ.

1. The decision of the Circuit Court of Appeals that the act of the bank in using the mails for the sole purpose of collecting the check after it had acquired title thereto

was in furtherance of the scheme to defraud and caused by the petitioners, is in conflict with applicable decisions of this Court and of other Circuit Courts of Appeals. *Burton* v. *United States,* 196 U. S. 283; *United States* v. *Kenofskey,* 243 U. S. 440; *Demolli* v. *United States,* 144 Fed. 363, 365.

2. The ruling of the Trial Court, affirmed by the Circuit Court of Appeals, that it is not essential to the commission of an offense under the Mail Fraud Statute that the matter mailed be placed in the post office by the defendant himself or by one acting for him is revolutionary in character and makes one responsible for the independent act of another. This ruling is applicable to any criminal or civil proceeding where the responsibility of one for the act of another is involved, and is in conflict with every decision of this Court and of other Circuit Courts of Appeals which have been decided upon the theory that one is not responsible for the act of another where the relationship of principal and agent does not exist.

3. The indictment alleges that the scheme to defraud "was to be effected by the use of the mails." This allegation made intent an essential element of the crime. The Trial Court instructed the jury that the crime was complete if the mails were used as a probable consequence of defendants' act and thereby submitted to the jury an accusation of the scheme essentially different from that described in the indictment. *The indictment was not tried. Defendants were tried on a different accusation framed by the prosecutor and the Court.* Such ruling is in conflict with applicable decisions of this Court and other Circuit Courts of Appeals.

ARGUMENT.

I.

The act of the Whitney Bank in causing the check to be placed in the mails to be sent to the City National Bank of Baton Rouge was the independent act of the bank, not in furtherance of the scheme charged and not caused by the defendants.

When the trial court correctly ruled that the Whitney Bank by cashing the check for Hart thereby became the owner of said check and could not have acted as defendants' agent in the collecting of its own check, the case against the petitioners ended. It is settled law that the matter mailed must have some relation to and be a step in the execution of the scheme charged, *McLendon* v. *United States,* 2 F. (2d) 660; and be mailed with the intent to aid in its execution. *Brewer* v. *United States,* 290 Fed. 807; *Barnes* v. *United States,* 25 F. (2d) 61, 64.

There is no doubt that the legal effect of the bank cashing the check was a change of ownership of the paper, and that the subsequent action of the bank in using the mails to obtain payment for itself of the check which it had purchased "can in no sense be said to be an action of an agent for a principal, but the act of an owner in regard to its own property." *Burton* v. *United States,* 196 U. S. 283, 301.

The check was placed in the mails by the Federal Reserve Bank as the agent of the Whitney Bank and not as the agent of Hart. The check was sent forward to be paid to the Whitney Bank, and the Whitney Bank and not Hart, was its owner when it was sent. The final payment of the check by the City National Bank of Baton Rouge was a payment to the Whitney Bank and not to Hart. *There was no use of the mails by the defendants or for the defendants.* The use of the mails was caused by

the Whitney Bank and was for the sole purpose of collecting for itself as owner the amount of the check it had purchased. *Such use of the mails was the independent act of the Whitney Bank, independent of the defendants and independent of the scheme charged to have been devised by the defendants.*

From the time Hart sold the check to the Whitney Bank he had no further interest in or control over said check, and no right to issue instructions to the Bank to use or not to use the mails in the collecting of the check. At the time the mails were used Hart had already received $75,000 for the check and had no interest in and was to receive no part of the $75,000 to be paid on the check to the Whitney Bank. *The check's connection with the defendants and with the scheme charged ended when Hart sold the check to the Whitney Bank and received $75,000 in currency.* As stated by this Court in *Burton* v. *United States* (*supra*) 297: "From the time of the delivery of the check by the defendant to the bank, it became the owner of the check; it could have torn it up or thrown it into the fire or made any other use or disposition of it which it chose, and no right of the defendant would have been infringed."

Had Hart presented the check to the Whitney Bank for collection instead of cashing it, the bank would have become Hart's agent and the defendants would have been responsible for any use of the mail made by the bank in collecting the check, though the bank was an entirely innocent agent. As collection of the check in that case would have been a necessary part of the working out of the scheme, the defendants would have caused the use of the mails in furtherance of the scheme charged. *Spear* v. *United States,* 246 Fed. 250; *Tincher* v. *United States,* 11 F. (2d) 1821; *Mackett* v. *United States,* 90 F. (2d) 462, 464.

However, title to the check passed to the bank when the bank paid Hart $75,000 for the check. Collection of the

check was no longer any part of the working out of the scheme. Collection of the check by the Whitney Bank was apart from and independent of the scheme and not a step in its execution. The use of the mails by the Whitney Bank could have no effect, direct or indirect in the furthering of the scheme. There was no use of the mails for the purpose of executing the scheme and therefore no violation of the Mail Fraud Statute.

The court's submission of the cause without any basis in fact and upon an untenable theory of "causation," that is, "causation" without "agency" was a revolutionary rewriting of the general principles of responsibility of one for the acts of another. This ruling permitted the jury to determine whether the defendants caused and were responsible for the independent use of the mails by the Whitney Bank, although both the instructions of the Court and the record on its face eliminated that question and made its consideration logically impossible.

It is elementary that one cannot cause or be responsible for the act of another where the relationship of principal and agent does not exist. *Mosby* v. *Kimball,* 345 Ill. 420; *National Bank of Spokane* v. *Bank of Little Rock,* 58 Fed. 140. It is solely through the operation of the principle of agency that the act or declaration of one, associated with others in the prosecution of a common plan or enterprise, lawful or unlawful, is admissible against and binding upon all, *Hitchman Coal and Coke Co.* v. *Mitchell,* 245 U. S. 229, 249; *Kassin* v. *United States,* 87 F. (2d) 183. One cannot cause or be responsible for the independent act of another. The very words imply a contradiction in terms. Agency is essential to establish causation. Absent agency, absent causation.

This principle is as applicable to offenses under the Mail Fraud Statute as to any other type of criminal case. One is responsible for the act of another in placing a letter in the mails in execution of a scheme to defraud, only where the relationship of principal and agent exists. This

does not mean that it is essential to the commission of the offense that the letter be placed in the mails by the defendant himself or by another acting under his express direction. Responsibility follows whether an agent, express or implied, innocent or otherwise is intentionally employed to reach and use the mails in affecting a scheme to defraud. *Spear* v. *United States,* 228 Fed. 485, 488. The purpose of the Statute is to prohibit the use of the mails in furtherance of a scheme to defraud, and to punish one who procures such use, whether he acts through innocent agents or otherwise. *United States* v. *Guest,* 74 F. (2d) 730.

Cause is used in the Mail Fraud Statute "in its well known sense of bringing about." *United States* v. *Kenofskey,* 243 U. S. 440, 443. For one to "bring about" the use of the mails it is clear that he must do some act to effect that result. It must be evident that one cannot cause or "bring about" the use of the mails where the letter is placed therein by one "in no sense" his agent, that is, by one "in no sense" acting for him. The necessity for the existence of the relationship of principal and agent to establish responsibility for the act of another applies with the same force to the act of placing a letter in the mails in the execution of a scheme to defraud, as to any other act.

True, it has long been settled that a defendant may cause a letter to be sent or delivered by mail in execution of a scheme, though such a mode of transmission was neither known nor intended, *provided use of the mails as a step in the execution of the scheme* was the natural and probable consequence of an act intentionally done by the defendant in executing the scheme or might reasonably have been foreseen by the defendant at the time such act was committed. The aforesaid rule is due to the fact that intent to use the mails is not an essential element of the offense, and not to any modification of the rule requiring the existence of the relationship of principal and agent to

establish one's liability for the use of the mails by another. Where a letter is placed in the post-office by a person other than the accused, the rule of probable consequence has no relevancy to the question whether such person was acting for the accused or for himself. It is only after it has been determined that the person placing the letter in the mail is the agent of the accused, that the question arises whether the placing of the letter therein *as a step in the execution of the scheme* was the natural and probable consequence of an act intentionally done by the accused in executing the scheme or might reasonably have been foreseen by him at the time the act was committed.

Moreover, not every incidental use of the mails that occurs as a result of the scheme would constitute a violation of the law. The letter must be mailed or caused to be mailed in furtherance of the scheme by the defendant. *Spillers* v. *United States,* 47 F. (2d) 893. The general rule may be deduced from the reported cases, that whenever a person sets in operation and makes use of an agent or agency which as he knew at the time would according to its established and regular course place a letter in the mail as a step in the execution of the scheme, he is guilty of causing the mails to be used in furtherance of such scheme. Such a rule would require, where the letter is placed in the mails by another, that such person act for the accused, that is, as his agent.

The trial court's submission of the cause to the jury, affirmed by the Circuit Court of Appeals, upon the theory that it was not essential to the commission of the offense that the check be placed in the mails in furtherance of the scheme to defraud, by the defendant or by one acting for the defendant does violence to the fundamental principles of all criminal, civil and moral law, and is clearly in conflict with the decision of this Court in *United States* v. *Kenofskey, supra,* and the decision of the Circuit Court

of Appeals, Eighth Circuit in *Demolli* v. *United States,* 144 Fed. 363, 365.

The Circuit Court of Appeals in affirming the judgment of conviction utterly failed to pass upon the correctness of the Trial Court's ruling upon causation, but adopted a different theory in its attempt to avoid the logical consequence of the bank's ownership of the check at the time the mails were used. The Circuit Court of Appeals affirmed the conviction of the defendants on the assumption that the alleged scheme to defraud was not at an end when Hart endorsed and presented the check to the Whitney Bank, but continued until the L. S. U. account at the City National Bank of Baton Rouge was charged with the check. The sole basis for this conclusion, as stated in the opinion of the court, is that the University sustained no actual loss until the check had been finally paid and up to that time the University might have intervened to stop payment and the fraudulent scheme would have been frustrated.

The Circuit Court of Appeals in reaching its conclusion completely overlooked the legal effect of the bank's cashing of the check for Hart. The Whitney Bank by cashing the check and paying Hart $75,000 in currency, the face amount of the check, became a holder in due course of said check. This fact cannot be disputed. It is elementary that the drawer of the check has no legal right to revoke his check, that is, stop payment after the instrument has passed into the hands of a *bona-fide* holder for value. *Universal Supply Co.* v. *Hildreth,* 287 Mass. 538; *Carhort* v. *Second National Bank,* 98 N. J. L. 373; *Gage Hotel Co.* v. *Union National Bank,* 171 Ill. 551. Fraud relating to the consideration for which a check is given is never a defense in an action thereon by a *bona-fide* holder for value in due course. *Bridgeport Nat. Bank* v. *Blackman,* 249 N. Y. 322.

The University's liability on the check was established and fixed the moment the check was purchased by the

Whitney Bank. It is true that the University might have ordered the bank not to pay the check and, as between the University and the Bank, the Bank in such case would pay at its peril, but such an order could not or would not discharge the liability of the University to the Whitney Bank. Such order would not have frustrated the scheme to defraud, if it were one, for the defendants had already collected the $75,000, the object of the fraud, and the University was liable to the Whitney Bank for the $75,000 which had been paid to Hart in good faith and without notice of the alleged fraud.

It may be well to call the Court's attention to the fact that counsel in this Petition do not contend that the scheme was at an end when the Bank cashed the check for Hart, but do contend that the check's connection with the scheme was at an end, and that the use of the mails by the Whitney Bank to collect for itself as owner the amount of this check, could not have been for the purpose of executing the scheme charged or in furtherance thereof.

The Circuit Court of Appeals further held that Hart clearly caused the mails to be used in furtherance of the scheme to defraud. The sole basis of this conclusion, as stated in its opinion, is that "when Monte Hart presented the check to City Bank Branch it could be reasonably foreseen that in the usual course of events the check would pass through the United States Mail to Baton Rouge to be paid."

Conceding this fact, such knowledge would not make Hart guilty of the offense charged unless the Federal Reserve Bank in placing the check in the mails to be sent to the Bank at Baton Rouge acted for Hart and the check was placed therein for the purpose of executing the scheme charged. Section 215 of the Criminal Code does not prohibit the general use of the mails to the deviser of a scheme to defraud or make the placing of the check in the mails *per se* a violation of the statute. The

statute prohibits the use of the mails to a deviser of a scheme to defraud only when such use is for the purpose of executing such scheme or attempting so to do, and makes the placing of a check in the mails an offense only when the check is placed therein or caused to be placed therein by the defendant for the purpose of executing such scheme.

In the instant case the use of the mails was caused by the Whitney Bank for the sole purpose of collecting for itself as owner the amount of the check from the bank upon which it was drawn. The use of the mails was therefore the independent act of the Whitney Bank, not in furtherance of the scheme charged and not caused by the defendants.

II.

The indictment alleges that the scheme alleged was to be effected by the use of the mails and the court below erred in submitting the case to the jury on the theory that the defendants might be held responsible for the use of the mails not intended by defendants as a part of the scheme.

As the indictment stands it alleges an agreement or conspiracy on the part of the defendants to use the mails in order to carry out their scheme (R., 4-13). It is true that a crime might have been alleged in different form, as is commonly done, and the element of intent to use the mails would then have been eliminated, but that is not the situation in this case.

The court below erred in ignoring this fundamental element of the case and proceeded to submit the case to the jury on the theory that there need be no intent to use

the mails on the part of the defendants, but that they would be responsible for any use of the mails, which was the natural and probable consequence of their acts. The court in its instructions told the jury that it was not necessary that the defendants should directly use the mails or use the mails through an agent or that they should intend to use the mails, but that under the theory of causation, the defendants could be guilty of using the mails even if the person actually using them was not their agent.

These instructions were wholly inapplicable to this type of indictment. An exception to the charge on the subject of causation was duly taken (R., 1019). Error was also assigned on this ground (R., 1671).

The case tried clearly was not the case alleged, and defendants were convicted of using the mails without intent to use them, although the indictment alleges that their plan was to use the mails for the purpose of effecting the scheme. The case as alleged in the indictment, is essentially the same as a charge of conspiracy to cause the use of the mails in furtherance of a scheme to defraud. In such case the intent to use the mails must be proved and appropriate instructions must be given on the subject.

It is respectfully urged that this point is fundamental to the very basis of the Government's case and that a disposition of the case which ignores the point amounts to fundamental error. It involves also a conflict with numerous decisions on the subject of intent to use the mails, where that intent is alleged as an element of the crime. *Mazurasky* v. *United States,* 100 F. 958, 962; *Farmer* v. *United States,* 223 F. (2d) 903, 907.

Conclusion.

It is urged that the petition presents an important question of Federal law of wide application and public interest and a serious conflict between the decisions of the

Courts below and applicable decisions of this Court and various Circuit Courts of Appeals which requires the exercise of this Court's supervisory jurisdiction.

Respectfully submitted,

HUGH M. WILKINSON,
DAVID V. CAHILL,
JOHN R. HUNTER,
ROLAND C. KIZER,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1940.

No. 322.

J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LeSAGE,

Petitioners,

vs.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to The United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONERS' REPLY TO MEMORANDUM OF THE UNITED STATES.

David V. Cahill,
Of Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

J. EMORY ADAMS, SEYMOUR WEISS, and LOUIS C. LESAGE, *Petitioners*,

AGAINST

UNITED STATES OF AMERICA.

No. 322.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners' Reply to Memorandum of the United States.

The Government opposes the filing of the Additional and Supplemental Petition upon two grounds:

(1) The petitioners are attempting to render nugatory the 30 day rule applicable to the filing of a writ of certiorari in a criminal case.

(2) The Government has already filed a brief in opposition to the petition for writ of certiorari as originally framed.

Neither ground is sound in fact or logic. Petitioners' application does not seek to avoid the 30 day rule. The original petition was filed within 30 days after entry of the judgment of the Circuit Court of Appeals as required

by Rule 11, Criminal Appeals Rule. This motion was made returnable on the first available motion day. No delay is sought by petitioners and none can result from the granting of this motion. The petitioners simply seek, as stated in their petition, to be permitted to file "in more concise form the reasons for granting the writ and arguments therefor, and additional grounds and arguments not contained in the prior petition".

If the application has been mislabeled and should have been for leave to file an Additional and Supplemental Brief in support of the original petition, the Court may consider it as such. However, the reasons and arguments therein advanced by counsel as worthy of this Court's consideration should not be rejected without regard to their merit simply because the Government has filed a brief, which may, or may not, answer said reasons and arguments. Counsel respectfully submits that it is desirable in the interests of justice that all existing grounds and reasons either in support of or against the granting of the writ should be brought to the Court's attention and passed upon.

The filing of such a petition is not without precedent. In *Weinhandler* v. *United States,* October Term, 1927, Case No. 481, counsel for petitioners was granted permission, on motion, to file in that case a second and more concise petition, supplementing or taking the place of one previously filed. Counsel respectfully asks that the reasons and grounds stated in the Additional and Supplemental Petition be considered by this Court in deciding whether the writ of certiorari shall issue as prayed for by petitioners.

Respectfully submitted,

DAVID V. CAHILL,
Of Counsel for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1940.

No. 322.

J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LeSAGE,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

HUGH M. WILKINSON,
DAVID V. CAHILL,
JOHN R. HUNTER,
ROLAND C. KIZER,
Attorneys for Petitioners.

INDEX.

TABLE OF CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

J. EMORY ADAMS, SEYMOUR WEISS, and LOUIS C. LESAGE, *Petitioners*,
AGAINST
UNITED STATES OF AMERICA.
No. 322.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray that a rehearing be granted of the petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit filed herein and denied on the 21st day of October, 1940.

Questions Presented By Former Petitions.

The Petition and an Additional and Supplemental Petition filed herein presented the following questions:

1. Whether the petitioners caused a check to be placed in the mails for the purpose of executing the scheme charged, where a bank, which had cashed the check for one of the defendants, used the mails for the sole purpose of obtaining payment for itself of the paper which it had purchased.

2. Whether a defendant may cause and be criminally responsible for the act of another where the relationship of principal and agent does not exist.

3. Whether intent to use the mails is an essential element of the crime charged where the indictment alleges that the scheme devised "was to be effected by the use and misuse of the post office establishment of the United States" (R., 4).

The Petition and the Additional and Supplemental Petition in presenting the first question to the Court for its consideration urged that the record showed that the act of mailing made the basis of each count of the indictment was not the act of the petitioners and was not in furtherance of the scheme charged. It is believed that this question could have rested and perhaps should have rested on the indictment alone and not upon a review of the evidence.

Additional Questions Presented.

The petition for a rehearing presents the following additional questions:

1. Whether the indictment on its face shows that the United States District Court for the Eastern District of Louisiana was without jurisdiction to try or pass judgment upon the petitioners.

2. Whether the natural and probable consequence rule applies where the act of the defendant is not the proximate cause of the mails being used.

3. Whether proof of a general custom of mailing by the bank is sufficient to establish that the check was caused to be placed in the mails by the petitioners.

ARGUMENT.

I.

The indictment on its face shows that the trial court was without jurisdiction to try or pass judgment upon the petitioners.

The scheme to defraud charged in the indictment is not within the jurisdiction of the federal court and can be brought within that jurisdiction only by charging that the defendants used the United States mails "for the purpose of executing such a scheme or artifice or attempting so to do."

Generally it is all-sufficient to allege, having charged the scheme, that the defendant "for the purpose of executing such scheme or artifice or attempting so to do" placed the letter, describing it, in the mail.

Even though the instant indictment alleges that the defendants "for the purpose of executing the scheme and artifice aforesaid * * * did knowingly deposit and cause to be deposited" the $75,000 L. S. U. check in the mail, it negatives this conclusion by its positive averment of facts. These facts clearly and unmistakably show that the check was not deposited in the United States mail for the purpose of executing or attempting to execute the fraudulent scheme. The trial court on such an in-

dictment had no jurisdiction to try or pass judgment upon the defendants. *Dyhre* v. *Hudspeth,* 106 F. (2d) 286.

The instant indictment alleges "that on the 27th day of October, 1936, the said check was cashed at the said City Branch of the Whitney National Bank and the sum of $75,000 in currency was handed by the bank to the defendant Monte E. Hart" (R., 7). The indictment thus charges a sale of the check by Hart and the purchase of it by the Whitney Bank. Upon delivery of the check to the Whitney Bank it became the owner thereof and was in no sense the agent of the defendants for the purpose of collecting the amount of the check from the City National Bank of Baton Rouge, the bank upon which it was drawn. *Burton* v. *United States,* 196 U. S. 283, 297.

The indictment further charges that the Whitney Bank cleared said check through the Federal Reserve Bank at New Orleans and that the Federal Reserve Bank "in order to effect payment of said check forwarded the said check on the 28th day of October, 1936, to the City National Bank in Baton Rouge, Louisiana by depositing same" in the United States mail (R., 8). The indictment thus charges that the Whitney Bank *caused* the Federal Reserve Bank to use the mails for the purpose of effecting payment of the $75,000 L. S. U. check of which at the time it was the owner.

Such a use of the mails could not be in furtherance of the scheme to defraud charged to have been devised by the defendants as Hart and the other defendants had no concern with the check after title to it had passed to the Whitney Bank. As said by this Court in *Burton* v. *United States, supra,* 297, "From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up, or thrown it in the fire, or made any other use or disposition of it that it cared to and no rights of the defendant would have been infringed."

The indictment clearly charges facts which show that the use of the mails was not for the purpose of executing or attempting to execute the scheme charged. The trial court on such an indictment had no jurisdiction to try or pass judgment upon the defendants. Absence of jurisdiction clearly appears upon the face of the record.

II.

The natural and probable consequence rule does not apply to the instant case, as Hart's act in cashing the check with the bank was not the proximate cause of the check being placed in the mails to be forwarded to Baton Rouge for collection.

The act of the Whitney Bank in causing the check to be placed in the mails to be sent to the City National Bank of Baton Rouge for collection was the independent act of the bank (Additional and Supplemental Petition, pp. 7, 8).

Under the test laid down by the Courts in applying the natural and probable consequence rule, it is clear that in the line of causation the defendant's act must be the proximate cause of the letter, check or other matter being placed in the mails. *Demolli* v. *United States,* 144 Fed. 363, 366; *United States* v. *Weisman,* 83 F. (2d) 470, 474.

The test in determining whether the defendant's act is the proximate cause of the mails being used is, whether there is an unbroken connection between the defendant's act and the use of the mails.

Even the natural and probable consequences of a wrongful act or omission are not chargeable to the original wrongdoer in a negligence action, if there is a suffi-

cient independent cause operating between the wrong and the injury. *Milwaukee, etc. Ry. Co.* v. *Kellogg,* 94 U. S. 469; *The Milwaukee Bridge,* 15 F. (2d) 249-251.

Inasmuch as the act of the bank in placing the check in the mails was the independent act of the bank, it follows that Hart's act in cashing the check was not the proximate cause of the check being placed in the mails, and that the natural and probable consequence rule has no application to the instant case.

III.

Proof of a general custom of mailing by the bank, alleged to have forwarded the check by mail, is insufficient to establish that the petitioners caused the check to be placed in the mails.

The only evidence in the record relating to the use of the mails is that of general custom of mailing by the Federal Reserve Bank and the City National Bank of Baton Rouge.

No one testified that the cash letter and check was actually mailed or that the cash letter was addressed to the City National Bank of Baton Rouge, Louisiana, or placed in an authorized depository for mailing. No envelope to show such a course was introduced in evidence.

It is plainly evident from the statute that the mailing in furtherance of the fraud is the crux of the crime declared therein. Necessarily, therefore, the mailing in furtherance of the fraud must be proved before a conviction can be had or sustained. The proof need not be direct. It may be circumstantial, but the circumstances proven must be such as will directly support an inference of the fact to be established. An inference essential to the estab-

lishment of the crime cannot be rested upon another inference.

From the fact that it was the custom of the bank to mail a letter addressed to an out-of-town bank, it was necessary to infer that the letter had been mailed, and from the inference that it had been mailed it was necessary to infer that the defendants mailed it or caused it to be mailed. Such proof has been condemned by the Circuit Court of Appeals, Seventh Circuit, in *Mackett* v. *United States*, 90 F. (2d) 462, and by the Circuit Court of Appeals, Third Circuit, in the recent case of *Whealton* v. *United States*, 113 F. (2d) 710.

It is respectfully urged that the foregoing reasons merit reconsideration of the petition and the granting of the writ of certiorari.

Respectfully submitted,

HUGH M. WILKINSON,
DAVID V. CAHILL,
JOHN R. HUNTER,
ROLAND C. KIZER,
Attorneys for Petitioners.

I hereby certify that the above petition for a rehearing is filed in good faith upon a real and substantial ground, and not for mere purpose of delay.

Dated, New York, October 29, 1940.

DAVID V. CAHILL,
Of Counsel for Petitioners.

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CITATIONS

259193—40——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 322

MONTE E. HART, J. EMORY ADAMS, SEYMOUR WEISS, AND LOUIS C. LESAGE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 339

MONTE E. HART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1779–1785) is reported in 112 F. (2d) 128.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 24, 1940 (R. 1785), and petitions for rehearing (R. 1786–1823) were denied July 16, 1940 (R. 1825). The petition for a writ of certio-

rari in behalf of Monte E. Hart, J. Emory Adams, Seymour Weiss, and Louis C. LeSage (No. 322) was filed August 10, 1940, and the separate petition of Monte E. Hart (No. 339) was filed August 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The petition filed on behalf of all the petitioners presents the following questions:

1. Whether the petitioners "caused" the mails to be used within the meaning of the Mail Fraud Statute.

2. Whether the use of the mails occurred after the fraudulent scheme had terminated.

Petitioner Hart presents the additional questions:[1]

3. Whether there was sufficient evidence of a fraudulent scheme to warrant the trial court in denying the defendants' motion for a directed verdict.

4. Whether the trial court abused its discretion in denying the defendants' motion for a continuance.

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[1] After the page proof in this brief was received from the printer, the Government learned unofficially of the death of petitioner Hart. It may well be, therefore, that the discussion herein relating to the two additional questions presented in Hart's separate petition is unnecessary.

STATUTE INVOLVED

The pertinent provisions of the Mail Fraud Statute (Sec. 215, Criminal Code; U. S. C., Title 18, Sec. 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, * * * to be sent or delivered by the post-office establishment of the United States * * *, or shall knowingly cause to be delivered by mail according to the direction thereon, * * * any * * * letter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment in two counts was returned against the petitioners and one James Monroe Smith in the District Court for the Eastern District of Louisiana charging them with the devising of a fraudulent scheme and with having used the mails or caused them to be used in furtherance of the scheme, in violation of Section 215 of the Criminal Code (R. 4–13). All of the defendants were convicted upon both counts of the indictment (R. 39). Weiss and Hart were sentenced to imprisonment for thirty months and to pay a fine of $1,000

on each count; Adams and LeSage were sentenced to imprisonment for a year and a day and to pay a fine of $500 on each count. All of the prison sentences were to run concurrently (R. 40–45). Upon appeal the convictions were unanimously affirmed.[2]

Briefly summarized, the indictment alleged that the defendants devised a scheme to defraud the Louisiana State University, the State of Louisiana, and the taxpayers of that state by pretending and purporting to sell to the Louisiana State University a certain hotel, including furnishings of every kind and description, and then obtaining an additional $75,000 for the same furniture from the same buyer.

The mailing relied upon in the first count of the indictment involved the transmittal of a cash letter, together with a check for $75,000 obtained by the defendant Hart from the Louisiana State University in payment for the furniture which had supposedly been sold to the University as a part of the hotel property. The check, payable to the National Equipment Company, a company controlled by Hart, was drawn upon the City National Bank at Baton Rouge (R. 459, 853; Ex. G–5, R. 1043). Hart took the check, which he endorsed, to the City Bank Branch of the Whitney National Bank in New Orleans, received $25,000 in cash and opened an account for the remaining $50,000 in

[2] The defendant James Monroe Smith appealed but later abandoned his appeal (R. 1029, 1780).

the name of the National Equipment Company. After receiving the $75,000 check from Hart, the Whitney National Bank endorsed the check and delivered it by messenger to the New Orleans Branch of the Federal Reserve Bank of Atlanta (R. 516, 537–541). The Federal Reserve Bank included the $75,000 check as an item in a cash letter which it mailed to the City National Bank at Baton Rouge, on which the check was drawn (R. 551, 560–563; Ex. G–64, R. 1341).

Upon the receipt of the cash letter the City National Bank at Baton Rouge charged the account of the Louisiana State University with the amount of the check (R. 565) and mailed to the Federal Reserve Bank in New Orleans a letter acknowledging receipt of the cash letter and instructing the latter to charge its account with the items included in the cash letter (R. 568–570; Ex. G–65, R. 1352). The transmittal of this acknowledgment of the cash letter constituted the use of the mails charged in the second count.

ARGUMENT

I

The petitioners do not contend that the mails were not used; they do not contend that the use of the mails was not reasonably foreseeable by them or that the use of the mails was not a natural and probable consequence of their acts; their only contention is that there is no proof in connection with either the first or the second counts that they

"caused" the mails to be used in furtherance of a scheme to defraud. Petitioners assert first, that the use of the mails condemned by the Mail Fraud Statute is based upon the existence of an agency relationship between the defendants who are charged with the use of the mails and the person actually depositing the letter in the mail, and second, that *Burton* v. *United States,* 196 U. S. 283, establishes the rule that where, as here, a bank accepts from the payee a check which has been unrestrictedly endorsed, the bank cannot be considered an agent of the payee. Consequently, they urge that when the trial court instructed the jury that it was not essential to the commission of the offense that the mailed matter be deposited "by an agent" of the defendant and that the jury must treat as surplusage a charge in the indictment that the New Orleans Bank, in which the check was deposited, acted as the defendants' agent (R. 1009–1011), the court eliminated the possibility of the defendants' having caused the use of the mails.

We submit that the Mail Fraud Statute is satisfied by simple causation; that it does not depend upon an agency relation; and that consequently the *Burton* case is nowise applicable to the problems raised.

(a) The Mail Fraud Statute contains no limitation that the use of the mails which it condemns shall be by the defendants or their agents. The statute, in simple terms, condemns the action of

anyone who "causes" the mails to be used. Ordinarily, agency implies the existence of a causative relationship; but causation does not necessarily or ordinarily imply a strict agency.[3] Ordinarily, no confusion arises when the term agency is used instead of the term causation. But in the instant case the use of the agency terminology would have obscured the fact that the pivotal point pertained to causation. Petitioners injected into a mail fraud case a question of agency with respect to the proprietary interests in the check when the real issue was one of causation with respect to an entirely different problem, that is, the mailing of the check. No doubt, the *Burton* case laid down the rule that when a payee deposits a check in a bank, the bank becomes the owner thereof; but here, whether the bank became the owner of the $75,000 check or whether Hart remained the owner is not an issue; the only issue is whether petitioners caused the mails to be used. Manifestly, when the trial court

[3] Agency has been defined as "the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement, Agency, Section 1 (1933 Ed.). Under no conceivable view was agency in this technical sense present in numerous cases wherein the defendants are held to have "caused" the use of the mails. See *United States* v. *Weisman*, 83 F. (2d) 470 (C. C. A. 2d), certiorari denied, 299 U. S. 560; *United States* v. *Kenofskey*, 243 U. S. 440; *Headley* v. *United States*, 294 Fed. 888 (C. C. A. 5th). The existence of an agency relationship is sufficient, but not necessary, to establish causation.

said that the bank was not the defendants' agent for the collection of the check, since it had become the owner thereof, the court was merely attempting to remove from the jury's consideration a question wholly irrelevant to the real issue involved. The real issue was not whether, under the law of negotiable instruments or of agency, the bank was the defendants' agent for the collection of the check, but whether, under the principle of causation, the defendants could be held responsible under the Mail Fraud Statute for the use of the mails which followed the depositing of the check. There is clearly nothing in the *Burton* decision which would preclude the conclusion that the defendants caused the mailing of the $75,000 check by the owners thereof.[4]

(b) In support of their view that the Mail Fraud Statute requires the existence of a strict principal and agent relationship, the petitioners rely upon two groups of decisions.

(1) In discussing the first group, petitioners refer to the use of the word "agent" in *United States* v. *Kenofskey,* 243 U. S. 440, 443, and the word "agency" in *Demolli* v. *United States,* 144

[4] Although the trial court did not require that a strict principal and agent relationship exist between the defendants and the person who actually deposited the letters in the mail, it required proof that the defendants caused the use of the mails and it faithfully followed the language of the statute and pertinent cases in its charge that proof of causation was necessary (R. 1009–1010).

Fed. 363, 366 (C. C. A. 8th). Neither of these decisions, however, warrants the narrow construction placed upon these terms by the petitioners. In the former case, Kenofskey, a life-insurance-company employee, certified and delivered to the company's local superintendent a false claim, proof, and certificates for the purpose of defrauding the company. In the due course of business the superintendent, who acted innocently, approved the documents and mailed them to the company's home office for final approval. In ruling that Kenofskey, within the meaning of the Mail Fraud Statute, caused the mailing of the false proofs through the superintendent, this Court said (p. 443):

> "Cause" is a word of very broad import and its meaning is generally known. It is used in the section in its well-known sense of bringing about, and in such sense it is applicable to the conduct of Kenofskey. He deliberately calculated the effect of giving the false proofs to his superior officer; and the effect followed, demonstrating the efficacy of his selection of means. It certainly cannot be said that the superintendent received authority from the insurance company to transmit to it false proofs. He became Kenofskey's agent for that purpose and the means by which he offended against the provisions of the statute.

It is, therefore, evident that this Court used the word "agent" in referring to the superintendent not in the strict sense of principal and agent but in

the sense that the superintendent was the instrumentality by which the use of the mails was effected. It is only in that sense that the doctrine of agency was referred to in the *Kenofskey* case.

A similar use of the word "agency" was made by Circuit Judge (later Justice) Van Devanter in the *Demolli* case, *supra,* in holding that a defendent who sent to a newspaper an obscene article which the newspaper published and sent through the mails was responsible for the causing of the mailing of the article by the newspaper.

(2) The second group of cases cited by the petitioners holds that a defendant who delivers a check to a bank for collection may be held accountable for such use of the mails as may be employed by the bank in collecting the check. Where, of course, a strict principal and agent relationship exists between a depositor and a bank, no one can question that the depositor "caused" the bank's use of the mails. But these decisions do not, as the petitioners seem to imply, require the existence of a strict principal and agent relationship. It has frequently been held that a defendant is chargeable with causing the mails to be used either if he does an act with knowledge that the use of the mails will be its natural and probable consequence (*United States* v. *Kenofskey, supra; Demolli* v. *United States, supra; United States* v. *Weisman,* 83 F. (2d) 470, 474 (C. C. A. 2d), certiorari denied, 299 U. S. 560; *Smith* v. *United States,* 61 F. (2d) 681, 684 (C. C. A. 5th), certiorari denied, 288 U. S. 608; *Shea*

v. *United States,* 251 Fed. 440, 448 (C. C. A. 6th), certiorari denied, 248 U. S. 581) or if he reasonably might have foreseen that as a result of his act the mails would be used (*United States* v. *Weisman, supra,* at p. 473; *Smith* v. *United States, supra; Corbett* v. *United States,* 89 F. (2d) 124, 127 (C. C. A. 8th); *Shea* v. *United States, supra; Spivey* v. *United States,* 109 F. (2d) 181 (C. C. A. 5th), certiorari denied, No. 911, October term, 1939).

Under either test it is clear that the defendants were chargeable with having caused the mails to be used. The check deposited by the petitioner Hart in the New Orleans bank was drawn on a bank in Baton Rouge and hence was an out-of-town check. As is shown by the evidence (R. 536–541, 549, 559, 563), it was the invariable custom for such checks to be forwarded by mail for collection. Hart, a man of wide business experience (R. 772), must be presumed to have known of the existence of this custom. *Shea* v. *United States, supra,* at p. 448; *Burns* v. *United States,* 279 Fed. 982, 987 (C. C. A. 8th); *Spear* v. *United States,* 246 Fed. 250 (C. C. A. 8th).[5] In any event, the use of the mails was reasonably foreseeable.[6]

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[5] The record shows that of forty-five checks which the Louisiana State University issued to Hart and his companies during 1935 to 1937, forty-two were on the same Baton Rouge Bank upon which was drawn the check in question and that eight of these checks were deposited in banks in New Orleans (R. 988).

[6] The petitioners contend (No. 322, Br. 30–34) that the trial court improperly amended the indictment when it

II

It is further contended on behalf of all the petitioners that the fraudulent scheme had ended when the mailings relied upon in the indictment occurred, and, therefore, that these mailings could not have been made in furtherance of the scheme. Their contention is predicated upon the argument that the scheme was fully consummated when Hart presented the $75,000 check to the Whitney Bank and received the proceeds thereof.

This contention presents a picture of the scheme devoid of reality. Five individuals, not simply one (Hart), as the petitioners seem to assume, participated in the scheme and the distribution of its spoils. As pointed out by the Circuit Court of Appeals (R. 1782–1783), the evidence disclosed that of the $75,000 which Hart received as proceeds of the check, he apparently kept $25,000 for himself, paid $25,000 to the defendant Smith, with the cooperation of the petitioner Adams, and also paid $25,000 to petitioner LeSage, of which at least $16,500 was later turned over to petitioner Weiss (R. 227, 573, 582, 929, 943). It is also clear from the evidence that, at least as to the petitioners Le-

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charged the jury to treat as surplusage the allegation in the indictment that the New Orleans bank, in which Hart deposited the check, acted as the defendants' agent. However, it is clear that the trial court was simply removing from the jury's consideration an irrelevant question. See *supra*, pp. 6–8. The court clarified the allegations of the indictment; it did not in any wise amend the indictment. *Hall* v. *United States*, 168 U. S. 632, 639.

Sage and Weiss, the distribution of the proceeds occurred subsequent to the mailings charged in the indictment. The dates given therein with reference to these mailings are October 28 and 30, 1936 (R. 10–12), whereas the check of the National Equipment Company, used by Hart to pay LeSage, was not issued until November 7, 1936 (R. 227, 573; Ex. G–60, R. 1426), and Weiss did not secure his share until a year later (R. 1324).

Obviously, therefore, the scheme, at least, contemplated not only the securing of the proceeds of the sale of the hotel furniture, but also a distribution of the spoils among its participants. Until that was accomplished the scheme cannot be said to have terminated.[7]

Moreover, that the scheme was not a mere "fly-by-night" project, involving the obtaining of the $75,000 from the bank and the immediate flight of the participants, is evident not only from the delay in distribution of the proceeds but from the fact that the defendants were men of prominence in the community in which the scheme was executed,[8] and

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[7] Cf. *Tincher* v. *United States*, 11 F. (2d) 18 (C. C. A. 4th), certiorari denied, 271 U. S. 664; *McDonald* v. *United States*, 89 F. (2d) 128, 133–134 (C. C. A. 8th), certiorari denied, 301 U. S. 697; *Laska* v. *United States*, 82 F. (2d) 672, 677 (C. C. A. 10th) certiorari denied, 298 U. S. 689; *Skelly* v. *United States*, 76 F. (2d) 483 (C. C. A. 10th), certiorari denied, 295 U. S. 757.

[8] The defendant Smith was president of Louisiana State University (R. 1256); petitioner Weiss was president of the Roosevelt Hotel Corporation (R. 903); petitioner Hart was president of Hart Enterprise Electric Company and vice

as such necessarily sought to cloak their scheme with every appearance of legality and propriety and to maintain it on that plane so as to enjoy its fruits free from disclosure. To this end, it was essential that the scheme be carried through to successful fruition, an objective which could not, of course, be attained unless the University's check was cleared without objection and its payment approved without being questioned.[9] In these circumstances, the jury was justified in concluding that the scheme existed at least until the mechanical banking steps incident to the clearing of the check had been completed, and hence, that the mailings occurred while the scheme still had vitality.

III

The petitioner Hart, in his separate petition, contends that the Government failed to establish the existence of a scheme to defraud and that the trial court consequently erred in denying the motion for a directed verdict. In support of his contention, which is not joined in by the remaining petitioners, Hart has presented a lengthy and argumentative review of the evidence (Br. 14–24) and

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president of the Lee Circle Hotel Company and the Roosevelt Hotel Corporation (R. 772); petitioner Adams was manager of the Louisiana State University book store (R. 926); and petitioner LeSage was special assistant to the president of the Standard Oil Company of Louisiana (R. 1424).

[9] As president of the university, the defendant Smith was in a unique position to aid in the accomplishment of this object.

a legalistic argument (Br. 32–38) to show that the furniture was not included in the sale of the hotel. A comprehensive summary of the evidence reviewing the scheme to defraud and the participation of each of the petitioners is set forth in the opinion of the court below (R. 1780–1783). The Circuit Court of Appeals, after an extensive review of the facts in the case, decided that, "the proof in this case shows a fraudulent scheme" and that the trial court "properly refused to give a directed verdict" (R. 1784). Thus both the jury and the courts below have found against the petitioner Hart on the issue of sufficiency of evidence to establish the existence of a scheme to defraud. Under these circumstances this Court is not required to reexamine the evidence. *Delaney* v. *United States,* 263 U. S. 586, 589.

IV

Finally, the petitioner Hart, in his separate petition, alone contends that the trial court abused its discretion in denying the defendants' motion for a continuance. He asserts that a continuance should have been granted because newspaper attacks on the defendants after indictment and during the trial, which included purported statements of an Assistant Attorney General, created a hostile atmosphere and prejudiced the cause of the defendants.

Preliminarily, it should be noted that since the motion for continuance was filed before trial, it

could, of course, relate only to pre-trial events.[10] There is not even a scintilla of evidence in the record to show that during the trial the newspapers published any prejudicial articles or that the Assistant Attorney General made any improper statements.[11] But even if such were not the fact, the trial court cannot be put in error for denying a motion for continuance, made before trial, because of what may have occurred after the trial began.

As respects the alleged inflammatory newspaper articles which were printed about the defendants before the trial, the petitioner Hart is obviously in no position to assert prejudice unless these articles resulted in preventing him from obtaining a fair and impartial jury. As to this, the record is clear that the trial court took all possible precautions against a prejudiced jury. The prospective jurors were carefully examined on their *voir dire;* they were exhaustively questioned respecting their political connections, their reading of newspapers, and their prejudices and opinions (R. 185–213). Moreover, at the close of each trial day the trial judge cautioned the jurors to refrain from reading any newspaper articles or listening to any radio comments concerning the trial (R. 30, 31, 32, 33,

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[10] The motion for a continuance was filed on September 1, 1939 (R. 163–181), and the trial did not begin until September 5 (R. 213).

[11] *Berger* v. *United States*, 295 U. S. 78, upon which petitioner Hart relies, is consequently not in point, since that case related to prejudicial misconduct of the prosecutor during the course of the trial.

35, 36, 37, 38). The petitioner Hart cannot now be heard to question whether the jurors obeyed these repeated admonitions. If the defendants thought that these admonitions would not be effective, they could have requested that the jurors be locked up during the trial, but they failed to do so.

We submit the record abundantly supports the conclusion of the Circuit Court of Appeals that the trial court "carefully considered the motion for continuance and that every effort was made to assure a fair and impartial jury trial" (R. 1784).

CONCLUSION

The petitioners' contentions were given careful consideration by the Circuit Court of Appeals and found to be without merit. There is involved no conflict of decisions and there is presented no important question of Federal law. We, therefore, respectfully submit that the petition for writ of certiorari should be denied.

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SEPTEMBER 1940.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 322

J. EMORY ADAMS, SEYMOUR WEISS AND LOUIS C. LESAGE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The Government has been served with "Notice of Motion for Leave to File Additional and Supplemental Petition of J. Emory Adams, Seymour Weiss and Louis C. LeSage for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit," together with the "Additional and Supplemental Petition." The Additional and Supplemental Petition states (p. 2) that it presents "in more concise form the reasons for granting the writ and arguments therefor, and additional grounds and arguments not contained in the prior petition."

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The time for filing a petition for writ of certiorari has long since expired. In effect, the petitioners are attempting to render nugatory the rule of this Court requiring that a petition for writ of certiorari in a criminal case must be filed within 30 days after the entry of the judgment of the Circuit Court of Appeals. Rule XI, Criminal Appeals Rules. There is no provision in these rules for an extension of time for the filing of a petition for writ of certiorari. The Government has already filed a brief in opposition to the petition for writ of certiorari in this case as originally framed. We respectfully submit, therefore, that the requested permission to file the Additional and Supplemental Petition should be denied.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940